SUPREME COURT, U.S.

71-5381

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~715381~~

CORNELIUS LUCAS,

Petitioner,

—against—

NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner seeks a writ of certiorari to review a judgment of the Court of Appeals of the State of New York, affirming an order of the Supreme Court of the State of New York, Appellate Division, Second Department, which affirmed without opinion (1) a judgment of conviction rendered in Supreme Court of the State of New York, Kings County, on September 5, 1965, convicting petitioner after a trial before a jury of the crimes of Robbery in the First Degree, Grand Larceny in the First Degree, and Assault in the Second Degree; and (2) an order of the same date affirming an order of the Supreme Court of the State of New York, Kings County, entered October 15, 1968, denying after a hearing petitioner's motion for a writ of error coram nobis to vacate the above-mentioned conviction.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Petitioner argues that he was denied due process of law in violation of the United States Constitution, VI and XIV Amendments.

Facts

On May 19, 1965, before the trial in the action actually began, Norman Adderly, a co-defendant, offered to plead guilty to Robbery in the First Degree, Unarmed (2-4).* The Court then questioned Adderly who admitted the charges and implicated Lucas and Polhill (5-73). All defendants and their attorneys were present in Court during the proceedings. The Assistant District Attorney then revealed that it was his understanding that if Adderly testified to the truth on trial, substantially the same as he had just testified, then the First Degree Robbery plea would be vacated and a plea of Attempted Robbery in the Third Degree would be accepted (73-74). The Court said Adderly must tell only the truth and that the Court assumed that what he had just related was the truth. Adderly said he still wanted to take the plea (75). The Court then said that Adderly must tell the gospel truth on the witness stand even if it varied from what had just been related (78).

The trial began and in the opening of the People, the prosecutor informed the jury that Adderly had been promised consideration (92). The prosecutor also said that when Adderly was arrested, a .38 caliber gun was found in the car. An objection was sustained and the jury was instructed to disregard the statement. Lucas and Polhill both moved

* Numerical references are to stenographer's minutes.

for mistrial and observed that they were not in the auto when the gun was found. The prosecutor promised that he would identify the gun as one used in the robbery (102-03). The motions were denied (98-101). The attorneys for the defendants also told the Court and the prosecutor that the defenses would be alibi and that identification was in issue (90).

Norman W. Adderly testified that he was a defendant in this case, had a prior conviction and pleaded guilty to Robbery in the First Degree concerning the charges at bar. The witness said that if he told the truth he had been promised that the plea would be changed to Attempted Robbery in the Third Degree (106-07). No objections were taken to these statements.

Adderly said that he met Polhill and appellant on April 23, 1964 at about 9:00 or 9:30 P.M. and they went to Almeta Gardner's house with one James Brown. (Apparently a misprint in the record exists and the witness really meant Viola Jackson's house) (108-09). Brown told them that a numbers writer had about $5,000.00 in her house, under a pillow to pay off someone who had been a winner (111-13). Polhill, Lucas and Adderly after agreeing to secure the money (113-14) went to Almeta Gardner's house. Adderly knocked, a lady answered and they all forced their way in with guns drawn (116-17). Adderly told the woman they wanted the money and Lucas began to search the apartment (117-19). Polhill was near the bathroom from which a man's head suddenly protruded. The witness then heard a slapping sound (118-19). Adderly forced Mrs. Gardner into the bedroom, made her lay on the bed and tied her hands and feet (120). Polhill searched the woman's pocketbook and took some money out (120-21, 123-24). The victim said

she did not have the "hit" money but had given it tc her sister who lived across the street (121). Adderly gagged Mrs. Gardner but did not blindfold her and they all thereafter left after having been in the apartment for about 10 minutes (123-24).

Adderly, Lucas and Polhill drove to a bar on Fulton Street and on the way Polhill divided up the money, each of them, including Brown, receiving $18.00 (125-26).

The witness looked at an Army model Colt .45 gun and identified it as the one used by Polhill in the robbery. The gun had sandpaper marks on it which the witness recognized. After a voir dire the pistol was admitted in evidence (129-35).

Another gun was shown Mr. Adderly which he identified as the .38 caliber snubnosed revolver which he used that night. He had given the .45 to Polhill and Polhill had given the .38 to him (136-39, 142). Lucas had used a Beretta during the commission of the crime (143).

Adderly was arrested two days after the robbery, along with Polhill at about 9:30 or 10:00 at night while they were in Adderly's mother's automobile (144-45).

On cross-examination Adderly said he denied participating in the robbery when first questioned by the police but he had lied (157). The witness said that before he took the plea he knew he would take the witness stand and testify to the truth that the others were involved in the crime. That was the reason he was getting the Attempted Robbery Third Degree plea (164-65). It was not his understanding that he had to include the others if it was false, only if it was true (165-66). The witness had a prior conviction for Manslaughter (168). He had the .38 revolver a long time and

had gotten the .45 a few weeks prior to the crime and kept it in the closet of Mrs. Jackson's apartment, his girlfriend (174).

Upon further cross-examination Adderly said that the alibi he gave to the Assistant District Attorney in the Precinct was a lie (181-82): that if convicted here he would be faced with additional penalties as a second felony offender (199-201), but that the deal he made was conditioned on him taking the witness stand and telling the truth (202-03). The witness further said that after the robbery he and Lucas and Polhill agreed to have alibi defenses and he had lied in the Precinct in accord with that agreement (211-12).

Carl Junior Gardner, the husband of Almeta Gardner, was taking a bath on April 23, 1964 (222-23). He heard his wife yell and he jumped out of the bathtub. As he was opening the door, he was struck on the side of his head with a gun by a man who told him to get back in the tub (224-25). He saw the man and the gun and although he was bleeding, he did what he was told (225). The man left the bathroom but the witness could not get out until a chair which had been placed against the outside of the door was removed (226). The police were called and after they arrived, the witness was taken to the hospital (227). The witness identified Polhill as the man who hit him with the pistol (231-32).

On cross-examination the witness said he had seen Polhill in the police station and may have seen him in Criminal Court (237-38). Polhill was wearing a brown hat at the time of the robbery but the witness could not recall if he was wearing a tie or jacket (238-39). The first time he saw Polhill after the robbery was through a peephole at the

precinct (241). There were about five colored men in the room wtih Polhill when the witness picked him out and the witness did not recall any of them wearing uniforms (246-48).

The witness had one prior conviction for Disorderly Conduct (257-58).

Almeta Gardner was ironing in her apartment while her husband was taking a bath on the evening of April 23, 1964 (274). She heard a knock on the door and asked who it was. After a voice answered "Elijah", she opened the door and three men forced their way in (276). The lights were on and she saw all three men. Adderly grabbed her around the mouth and she was forced into the bedroom (277). All three men had guns (277). Adderly said that if she screamed he would kill her (278). She also said they took some money from under the pillow (278). The witness identified Polhill and Lucas and said they had guns (280).

Mrs. Gardner said that she saw the bathroom door start to open and that Polhill went over and raised his hand with a gun in it (281-82). She heard a noise and then Polhill closed the door (282). The witness then identified Adderly as the third man and said that while Adderly tied her up with a sheet, Lucas searched the apartment (283-86). About $140.00 was taken from under the pillow and from her pocketbook (287). Adderly asked her for the rest of the money and she told him it was at her sister's house. She gave them a false address and they all left (290-91). The witness said that the colt .45 looked like the gun Polhill had and the .38 looked like the one Adderly had (291-92).

The witness thereafter worked herself loose, went to the bathroom, removed the chair and found her husband bleeding (294). She called the police and after they came, her

husband was taken to the hospital (296-97). She said she did not pay attention to the clothes of the three men, but could not forget their faces (302). On April 26 she went to the Princinct and saw about six men through a peephole (309-12). None of them were wearing uniforms (313). She identified Adderly, Polhill and a Ulysses Bryant about whom she said at the time she was not sure of (317-22, 366, 369). Polhill had not worn a hat during the robbery but Adderly had (355).

Detective Arthur W. Broughton was on duty on April 23, 1964 and was waiting in front of 799 Marcy Avenue (373-74). Through binoculars he saw two men enter the building. He later saw Lucas pull up, enter the building and fifteen minutes later three men came out and drove away (370-75). Lucas was driving, Polhill was next to him and the third man was Adderly (376). He followed the car and after two stops, it stopped again at Bergen Street and Classon Avenue, about 200 feet away from 660 Classon Avenue, where Mrs. Gardner lived (377-79). On Saturday, April 25, the witness was present when Adderly and Polhill were arrested (380). Lucas was arrested the next day (382).

On cross-examination the witness said he was the one who found the gun in the car in which Adderly and Polhill were arrested (388).

The prosecution rested and defense motions to dismiss were denied (400-03).

Barbara Polhill was the first defense witness. She said that on the evening of the robbery her husband was home all evening except when he went out from 7:00 P.M. to 8:00 P.M. or 8:30 P.M. He did not leave between 8:30 and 12:00

except to walk Miss Myrtle Brown to get a taxi at around midnight. A friend of Miss Brown, whose name was not recalled, was also there (408-09).

Myrtle Brown testified that on April 23 she arrived at appellant's home about 9:00 P.M. and stayed there until 12:00 (429-30). Polhill was there the whole time and did not leave except to walk with her to get a taxi (431).

Cornelius Lucas, the appellant, said that after leaving the barbershop at about 7:45 P.M., he went to a service station at Atlantic Avenue and South Oxford Street. He picked up a transmission, towed it to Atlantic and Clinton and attempted to put it in his car (443). He worked on the car from 8:30 until 11:15 P.M. (444). He stopped at 722 Fulton Street from 12:30 until 1:00 A.M., and then went home (444). He was not with Adderly or Polhill that evening and took no part in the crime (444-45, 447).

On cross-examination Lucas admitted a prior conviction for embezzlement and that he owned a white Cadillac similar to that described by Detective Broughton (457, 462-63).

Viola Jackson said that Adderly was at her home and left around 9:00 P.M. Polhill and Lucas were not there that night as Adderly had previously testified (474-75). Adderly returned to her apartment alone at 11:00 o'clock (476). On cross-examination the witness said that Adderly had been her boyfriend but had stopped coming to her house in December, 1964 (489-498).

Clarence Oliver Wallace, a mechanic at a gas station on Clinton Street and Atlantic Avenue, said that Lucas came in about 7:00 or 8:00 P.M. (503-05). He worked on the transmission for a while and they both went to a bar on Fulton Street until 1:00 or 2:00 A.M. when they broke up

(505-06). The witness had a prior conviction for Possession of a Gun (507).

Cornelius Lucas was recalled to the witness stand and after the close of the case, the sixth count of the indictment, charging burglary, was dismissed (526).

The jury convicted both men of Robbery in the First Degree, Grand Larceny in the First Degree and Assault in the Second Degree.

ARGUMENT

I.

The trial court's refusal to grant a continuance was not an abuse of discretion. The court's denial of a continuance did not deprive petitioner any constitutional rights.

Petitioner asserts, and we agree, that an accused has a right to secure and call witnesses in his own behalf. The accused has a right to compulsory process in order to obtain witnesses in his own behalf. Such a right is clearly binding upon the States. *Washington* v. *Texas,* 388 U.S. 16, 18 (1967). Just as a defendant has the right to confront his accusers, he also has a right to present his own witnesses in order to establish a defense. *Washington* v. *Texas, supra* at p. 19.

At issue in the case at bar, however, is the question whether the trial judge abused his discretion in refusing to grant petitioner a continuance to locate a defense witness, and to secure compliance with a subpoena issued for hospital records sought to be used during cross-examination for the purpose of impeachment. "Disposition of a request for continuance is of this nature and is made in

the discretion of the trial judge, the exercise of which will ordinarily not be reviewed." *Avery* v. *Alabama,* 308 U.S. 444, 446 (1940).

In *Franklin* v. *South Carolina,* 218 U.S. 161, 169 (1909) in a murder case this court was confronted with a situation where the trial judge refused to grant a continuance sought on the ground that counsel for the accused had not had sufficient time or opportunity to examine the notes of the testimony taken before the coroner who investigated the case. The notes of the testimony were somewhat illegible and the party who prepared the notes was not at hand. The accused's counsel sought to use the testimony for impeachment purposes. This court held that the refusal to grant a continuance was no deprivation of due process.

This policy of treading lightly before reviewing the discretionary acts of a trial judge has been followed most recently in *Ungar* v. *Sarafite,* 376 U.S. 575 (1964). Reh. den. 377 U.S. 925. "(I)t is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." *Ungar* v. *Sarafite, supra* p. 589.

"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances presented to the trial judge at the time the request is denied. *Nilva* v. *United States,* 352 U.S. 385, 77 S. Ct. 431, 1 L. Ed. 2d 415; *Torres* v. *United States,* 270 F. 2d 252 (C.A. 9th Cir.); cf. *United States* v. *Arlen,* 250 F. 2d 491, C.C.A. 2d Cir.)." *Ungar* v. *Sarafite, supra* p. 589 (see also *U. S. ex rel. Hussey* v. *La Vallee,* 302 F. Supp. 305, 309 (E.D.N.Y. 1969); *United States* v. *Leach,* 429 F. 2d 956, 963 (9th Cir. 1970).

The policy according the trial judge discretion in granting a continuance and reviewing only abuses of this power has always been the law in New York. *People* v. *Shea,* 147 N.Y. 78, 89, 41 N.E. 405 (1895); *People* v. *Caple,* 31 A.D. 2d 752, 297 N.Y.S. 2d 498 (2d Dept. 1969); *People* v. *Roberts,* 29 Misc. 2d 621, 216 N.Y.S. 2d 959, 965 (Co. Ct. 1961), affd. 17 A.D. 2d 1030, 235 N.Y.S. 2d 832, Cert. Den. 374 U.S. 854.

The policy is followed in the federal courts.

> "It must be shown that the trial judge acted arbitrarily and substantially impaired defendant's ability to defend himself, before an appellate court will conclude that the trial judge abused his discretion. The test is a stringent one." *United States* v. *Ellenbogen,* 365 F. 2d 982, 985 (2d Cir. 1966) Cert. den. 386 U.S. 923; see also *Powell* v. *United States,* 420 F. 2d 799 (9th Cir. 1969); *Reiss* v. *United States,* 324 F. 2d 680, 682 (1st Cir. 1963) cert. den. *Jacobs* v. *United States,* 376 U.S. 911.

In *United States* v. *White,* 324 F. 2d 814 (2d Cir. 1963) the Court of Appeals held that the denial of a continuance was an abuse of discretion. In the *White* case, however, the defendant relied on the defense of entrapment, and the defense requested a continuance in order to call a "special employee" of the government as a witness. His whereabouts were known, and his temporary unavailability stemmed from an illness.

In the case at bar, defense counsel sought an adjournment in order to locate one Ulysses Bryant. As petitioner apparently concedes at p. 11 of his petition, an investigator employed by the defense was unable to locate Bryant. The presence of Bryant—indeed the question of whether he

was even alive—apparently could not be answered definitively at the time the continuance was sought. Apparently no evidence was before the court to indicate the reasonable likelihood of ever locating Bryant.

Petitioner contends that Bryant was a relevant and material witness to petitioner's defense on the issue of guilt. Bryant had been tentatively identified in a pretrial lineup as the perpetrator who, through a second lineup, was in fact petitioner.

Ideally, during the course of trial, both sides have all the evidence and witnesses at their disposal. Sometimes, as in the case at bar, this is not possible. If one considers that the absence of Bryant cannot be placed at the feet of the prosecutor's office, and there was no strong likelihood that in the foreseeable future Bryant would be located, the trial judge did not abuse his discretion.

In any case, the fact of the erroneous tentative identification was before the jury through the context of cross-examination of one Mrs. Gardner. Bryant's presence would only be of a cumulative nature. The trial judge quite clearly acted reasonably in denying petitioner's request.

(2)

Under attack also is the court's refusal to grant a continuance until certain psychiatric records, diligently subpoened by defense counsel, could be produced. The court denied a request for a continuance, saying that it would not speculate on the records, and counsel could act to punish them for contempt. Appellant correctly points out that, if the witness had been found insane, the jury should know it on the question of credibility. *People* v. *Rensing,* 14 N.Y.

2d 210, 250 N.Y.S. 2d 401 (1964). Although the action of the court may have been a little hasty, later events show that it would have made no difference.

Petitioner, subsequent to his conviction, sought to collaterally attack the judgment via a writ of error coram nobis. During the course of that proceeding, it was shown that Adderly had not been found insane, nor had any mental deficiencies been discovered at the hospital.

The facts as adduced on that hearing, if viewed as an offer of proof in the case at bar, show that, had the subpoenas been honored, the result of this litigation would not have been altered.

II.

The identification procedures at the precinct did not violate due process.

Petitioner attacks the pre-trial stationhouse identification procedure in this case as not being within our concepts of due process. It has been held that while *United States* v. *Wade,* 388 U.S. 218 (1967) is not retroactive (*Stovall* v. *Denno,* 388 U.S. 293 (1967); *People* v. *Brown,* 20 N Y 2d 238 (1967) the identification must square with our own concepts of due process. Thus the question which must be resolved is whether the identification procedure was so unfair as to amount to a denial of due process and whether Mrs. Gardner's identification of the petitioner was in any way the product of that unfairness. Such a claim must be determined by a consideration of the totality of the surrounding circumstances. *Stovall* v. *Denno, supra,* pp. 301-302; *Simmons* v. *United States,* 390 U.S. 377 (1968); *Foster* v. *California,* 394 U.S. 440 (1969); *Coleman* v. *Alabama,* 399 U.S. 1 (1970).

When a lineup was first held, Mrs. Gardner picked out Adderly, Polhill, and when she pointed out Bryant, she said *at the time,* she was not sure, he looked like the man (314, 317-322, 366, 369). Later on, while she was being questioned by the Assistant District Attorney, a series of men were brought in for her to look at individually.

There were no suggestions of any sort and she immediately identified Petitioner. The reason she was unsure of the first man was because in the lineup he wore a hat, whereas during the commission of the crime, he had not (321). The witness' unwillingness to identify just anyone is indicative of her free will. It added to her subsequent identification because then, when she was sure, she was more likely to have made a deliberate and uninfluenced choice. As she stated: "I told them in the beginning I didn't know for sure that was the man, but as soon as I seen the right man, I told him" (322).

It should also be noted that she said she saw him close up, the area was lighted and she said that the face left an impression because she was frightened (359, 277). She had also given the police a description, so apparently she was familiar with the faces (306).

The other factors which showed that no suggestive influences were present were that no one tried to intimidate, direct her, or suggest anything to her.

She said that the police did not suggest when they first asked her to come down that they had caught her assailant (309). She went to the precinct in her own car, not with the police (309), she went to the squad room without escort (311) and the police only told her that they wanted her to see if any of the men shown were the men who had com-

mitted the crime (311). There were six men in the lineup and she described it in great detail (310-315). After the lineup, men were brought in to her singly from time to time and when Lucas was brought in, apparently the only thing asked of her was if she recognized him (359).

It seems to Respondents that unless the Court will hold that showing appellant to the witness alone was *ipso facto* reversible error, under pre-*Wade* law, there was no unfairness here because not the hint of a suggestive influence was present. In a recent case, the Third Department did not vitiate a judgment because of an identification without a lineup. *People* v. *Weis,* 32 A D 2d 856, 301 N.Y.S. 2d 186, 191 (cert. den. 397 U.S. 1047). Also, the witness had a clear opportunity to see appellant during the crime and it is likely that the precinct procedure did not affect her in-court identification. See also, *People* v. *A.C.,* 27 N Y 2d 79 (1970) and *People* v. *Richardson,* 36 A D 2d 25 (4th Dept. 1971).

Additionally, the wrong identification was argued to the jury by counsel (533-534) and the Court gave a lengthy, clear and comprehensive charge on the issue of identification (625-630). The jury was told that they should consider the fairness of the procedure and that the identification must not have been the result of suggesting or prompting (627, 628-629). They were also told it would have to be accurate, reliable and unmistaken, that it should be strong, cogent and must be believed beyond a reasonable doubt (627, 628-630).

III.

Neither the court nor the assistant district attorney failed to correct false testimony. Petitioner was not denied due process.

Petitioner has contended during trial and on appeal through the State Courts, that Norman Adderly had a motive to implicate Petitioner in the crime. The fact is that the possible motives were all set out and inquired into at length (159-168), and the jury was fully aware of the inducements he had to testify, the conditions under which he testified, and his motives to tell or not to tell the truth. The jury was thus able to take this into consideration in deciding whether Adderly was a person worthy of belief and indeed, who should be believed. There simply was no withholding or suppression of evidence by the prosecutor.

We are cognizant of the policy set out in *Napue* v. *Illinois*, 360 U.S. 264 (1959) and followed in our Court of Appeals (*People* v. *Savvides*, 1 N Y 2d 554, 136 N.E. 2d 853, 154 N.Y.S. 2d 885 (1956); *People* v. *Mangi*, 10 N Y 2d 86, 217 N.Y.S. 2d 72 (1961). We merely assert that the record supports our contention that there was neither active nor passive non-disclosure as per the terms of Adderly testifying for the State. The weight to be given, if any, to his testimony was for the triers of fact and not reviewable on appeal.

CONCLUSION

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York
September 27, 1971

Respectfully submitted,

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